FOR ARGUMENT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. 79-602

DONALD W. AGINS AND BONNIE G. AGINS,

Appellants,

vs.

CITY OF TIBURON,

Appellee.

Appeal from the Supreme Court of California

AMICI CURIAE BRIEF OF THE AMERICAN PLANNING ASSOCIATION AND THE CALIFORNIA CHAPTER OF THE AMERICAN PLANNING ASSOCIATION IN SUPPORT OF APPELLEE

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Pursuant to Supreme Court Rule 42, the National Organization of the American Planning Association and its California Chapter respectfully submit this brief amici curiae in support of Appellee City of Tiburon. Consent to the filing of this brief has been granted in writing to amici by counsel for both

parties. These letters of consent have been filed with the Clerk of the Supreme Court.

INTEREST OF AMICI CURIAE

The American Planning Association and the California Chapter (hereinafter collectively referred to as "APA") were organized in 1978, as the result of a consolidation of the American Institute of Planners (founded in 1917) and the American Society of Planning Officials (founded in 1934). The APA today is a 23,000-member national organization dedicated to the advancement of the art and science of planning for the comprehensive development of communities, cities, regions and states, and to the participation of citizens in the process of planning. It represents both city and regional planners including professional practitioners (from both the public and private sector), educators, elected officials, and citizen planners.

The California Chapter, the APA's largest, representing 3,000 members, works together with the parent organi-

ation in support of comprehensive planning. Together they both have a long history of participation in public policy issues. For example, Alfred Bettman, whose amicus curiae brief in the case of Village of Euclid v. Ambler Realty Co., 272 U.S. 385 (1926), has been frequently noted in the history of zoning law, was a founder and active leader in APA's predecessor organization. He is memorialized in an annual Bettman Symposium on planning law conducted by APA. The APA's predecessor organization filed an amicus curiae brief accepted by this Court in City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976). Additionally, both the national APA and its California Chapter provide members with educational and research services and have in the past retained professionals to assist in undertaking an active role in the California and other state legislatures in support of comprehensive planning. APA may be the largest researcher and publisher on land use law, including its Land Use Law and Zoning Digest, a monthly publication

since 1949.

As professional and lay participants in local, regional and state planning decisions, amici are directly impacted by the issues raised in the instant case now pending.

SUMMARY OF THE ARGUMENT

Deference to state courts on questions of local land use regulation serves especially important interests of federalism. Land use control is a governmental function no less "essential to [the] separate and independent existence" of the states, National League of Cities v. Usery, 426 U.S. 833, 851 (1976), than are the fields of education and law enforcement policy in which this Court has commanded federal restraint. State courts have far greater familiarity with the evolving local conditions that have compelled different statutory approaches to the myriad problems facing the several states. They have also developed effective equitable remedies to invalidate and

restrain unconstitutional exercises of the police power by local land use authorities. But when "forced compensation" is sought by property owners who contend that local land use controls have "taken" their property by diminishing its value, the judicial branch -- at both federal and state levels -- is ill-equipped to develop reasoned legal doctrines and to fashion effective remedial mechanisms. Nor do the claims asserted by such property owners merit special judicial protection by the federal courts.

California, like many other states, has recently enacted important statutory reforms mandating local governments to develop and to implement comprehensive planning. The required local comprehensive plans are intended to bring about a greater measure of rationality and fairness to the local land use decisionmaking process. Given the particular conditions existing in California, the creation of a novel and unnecessary remedy of money damages in inverse condemnation actions that

challenge unwitting "takings" by local government authorities could seriously impact the fiscal integrity of these local governments. The prospect of such potentially devastating financial consequences will inevitably cause local planners and decisionmakers to weaken their efforts to develop and implement such fair and rational comprehensive land use controls. Important goals of efficiency and equity will thereby be profoundly compromised.

ARGUMENT

I. PRINCIPLES OF FEDERALISM AND COMITY REQUIRE THAT THE CALIFORNIA COURT'S DECISION SHOULD BE UPHELD.

Principles of federalism and comity require that federal courts exercise restraint in intervening in issues critical to state sovereignty and local autonomy. E.g., Ingraham v. Wright, 430 U.S. 651 (1977) (state procedures for corporal punishment in schools); Paul v. Davis, 424 U.S. 693 (1976) (police conduct resulting in alleged defamation); Rizzo v. Goode, 423 U.S. 362 (1976) (police department organization); Huffman v. Pursue, Ltd., 420 U.S. 592, 599-605 (1975) (state civil proceedings); San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 40-43 (1973) (complex issues of finance and educational policy); Younger v. Harris, 401 U.S. 37 (1971) (pending state criminal proceedings). Cf. National League of Cities v. Usery, 426 U.S. 833 (1976) (federal minimum wage and maximum hour provisions struck down as impermissibly intruding on "integral government services"); Warth

v. Seldin, 422 U.S. 490 (1975) (standing denied to various parties seeking to challenge a local zoning ordinance).

A. Local Land Use Control Has Historically Been Recognized As A Matter of Unique Importance to the States About Which State Courts Have More Familiarity and Expertise.

The federal courts have consistently recognized the desirability of deferring to the state courts on issues related to local exercises of the police power to regulate local land use. The state courts, including the California courts, have developed substantial expertise in complex, local land use litigation and have a high degree of familiarity with, and understanding of, local planning and zoning processes, state planning and zoning legislation, and the unique state and local problems which the planning and zoning laws address.

As early as Welch v. Swasey, 214 U.S. 91 (1909), this Court upheld a state supreme court's ruling that an ordinance limiting the height of buildings in one part of Boston was a valid

exercise of the police power, stating that whether such a local ordinance promotes "general and public welfare" is an issue which "the state court is familiar with, but a like familiarity cannot be ascribed to this Court." Id. at 105. The Court concluded that it has "the greatest reluctance in interfering with the well considered judgments of the courts of a state where people are to be affected by the operation of the law . . . . [The state court determination] will only be interfered with . . . where the decision is, in our judgment, plainly wrong." Id. at 106.

More recently, in City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976), the Court directed persons objecting to the results of a zoning referendum on state and federal grounds to raise their challenges "in state court, where the scope of the state remedy available . . . would be determined as a matter of state law, as well as under fourteenth amendment standards." Id. at 677.

> [State courts] are accustomed to reviewing local ordinances and are

> in a better position than a federal court to delineate the boundaries of local discretion in the area of land use in the first instance. For the court to sit as a board of zoning appeal from actions by a local city council and circumscribe local power * * * would cause needless conflict with the administration by the state courts of concerns with which they have infinitely more expertise and experience.

Fralin and Waldron, Inc. v. City of Martinsville, Va., 370 F.Supp. 185, 190-91 (W.D. Va. 1973).

> [S]tate land use policy is a sensitive matter subject to comprehensive local regulation. For a federal court to exercise its jurisdiction in areas of important state domestic policy creates an "unseemly conflict between two sovereignties, [and] the unnecessary impairment of state functions * * *" Martin v. Creasy, 360 U.S. 219 . . . (1959).

Kent Island Joint Venture v. Smith, 452 F.Supp. 455 (D. Md. 1978).

The growing reluctance of federal courts to interfere in local land use matters is reflected in many recent opinions where they have abstained. In Rancho Palos Verdes v. City of Laguna Beach, 547 F.2d 1092 (9th Cir. 1972),

the court exercised abstention under the doctrine of Railroad Comm'n of Texas v. Pullman, 312 U.S. 496 (1941). The court dismissed the case but retained jurisdiction without ruling on the issue of whether a development moratorium and interim open space element effected a taking without just compensation. The court discussed the propriety of avoiding interference with state land use policy, as follows:

> [L]and use planning . . . is today a sensitive area of social policy . . . . This is not only because much of the legislation is recent. California is attempting to grapple with difficult land use problems through new policies and new mechanisms of regulation. The state is also struggling with the problem facing cities and counties in those cases where their zoning efforts to preserve open space in response to the state's announced policy . . . may unwittingly have resulted in a seizure of property rights that they did not intend and cannot afford. Federal courts must be wary of intervention that will stifle innovative state efforts to find solutions to complex social problems.

547 F.2d at 1095. See also Newport Investments, Inc. v. City of Laguna

Beach, 564 F.2d 893 (9th Cir. 1977); Sea Ranch Ass'n v. California Coastal Zone Conservation Comm'ns, 537 F.2d 1058 (9th Cir. 1976); Ahrensfeld v. Stephens, 528 F.2d 193 (7th Cir. 1975); Fralin and Waldron, Inc. v. City of Martinsville, Va., 493 F.2d 481 (4th Cir. 1974); Hill v. City of El Paso, 437 F.2d 352 (5th Cir. 1971); Beck v. California, 479 F.Supp. 392 (C.D. Cal. 1979); Kent Island Joint Venture v. Smith, 452 F.Supp. 455 (D. Md. 1978); Planned Parenthood of Maryland v. Mayor and Alderman of the City of Annapolis, Civ. No. N-78-501 (D. Md. Apr. 7, 1978); Webber v. Skoko, 432 F.Supp. 810 (D. Ore. 1977).[1/]

1/ In Beck v. California, supra, the aggrieved property owner sued the State of California, the California Coastal Commission and its executive director for money damages in an inverse condemnation action based on the fourteenth amendment and 42 U.S.C. §§ 1983 and 1985 for their failure to allow construction of a single-family residence on the Malibu coastline. The court abstained, again emphasizing the importance of deference to state policy:

In determining whether [cont'd.]

B. Complex Schemes for Remedying Inequities of Zoning Perceived by Aggrieved Property Owners Are Most Appropriately Developed by the State Legislatures and Local Governmental Bodies Rather Than by the Courts.

In Village of Euclid v. Ambler Realty Co., 272 U.S. 385 (1926), this Court's landmark decision upholding the general constitutionality of local zoning ordinances, the opinion expressly recognizes that the problems and conditions to which the local zoning power is addressed inevitably vary from jurisdiction to jurisdiction. Different solu-

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1/ [cont'd.]

this doctrine is appropriate for the present action, the court must look to the particular facts presented here. The California coastline is a unique and valuable resource of that state. In order to protect that resource, the people of that state enacted extensive legislation providing for a complex system of regulation with state controls ultimately yielding to local control with state supervision through the local adoption and state approval of local coastal plans . . . . [cont'd.]

tions necessarily are formulated by different jurisdictions to confront different problems:

> The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities.

Id. at 387. As long as a legislative determination is "fairly debatable, the legislative judgment should be allowed to control." Id. at 388.

In Gorieb v. Fox, 274 U.S. 603 (1927), this Court again upheld the constitutionality of a local zoning ordi-

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1/ [cont'd.]

> In view of the above, this Court feels constrained not to interfere with the local administration of local laws. In this manner, the state can be the determining agent of its own affairs and will be able to develop a coherent and cogent procedure in handling the cases arising under the coastal acts of the state.

Id. at 400.

nance, concluding:

> State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable.

Id. at 608.

Likewise, the Court sustained land use restrictions in Zahn v. Bd. of Public Works, 274 U.S. 325 (1927), stating that "the settled rule of this Court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question." Id. at 328. See Moore v. City of East Cleveland, 431 U.S. 494, 514 n.1 (1977) (Stevens, J. concurring: "The statement of the rule in Zahn remains viable today.").

The state's legislative declaration of the public interest is to be treated as "well-nigh conclusive." Berman v. Parker, 348 U.S. 28, 32 (1954).

More recently, in Village of Belle

Terre v. Boraas, 416 U.S. 1 (1974), the Court upheld an ordinance which limited the use of land to single-family dwellings, excluded all multiple dwellings, and narrowly defined "families." The Court reaffirmed its traditional attitude of refusing to "second guess" legislators and planners. The Court held:

> We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be "reasonable, not arbitrary" and bears "a rational relationship to a [permissible] state objective" . . . .
>
> [E]very line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative not a judicial function.

416 U.S. at 8 (emphasis added).

And, in Warth v. Seldin, 422 U.S. 490 (1975), this Court again observed that state and local governments should, whenever possible, be relied on to oversee land use regulation:

> We note that zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the

> province of state and local legislative authorities. They are, of course, subject to judicial review in a proper case. But citizens dissatisfied with provisions of such laws need not overlook the availability of the normal democratic process.

Id. at 508 n.18.[2/]

2/ In making decisions as to the location, amount, and type of new residential and commercial development, local governments must consider a wide variety of concerns -- ranging from long-range intangible values frequently asserted by environmental and social interests, to the immediate, hard dollar demands invoked by real estate development interests. When the ultimate balancing of the local governmental body is challenged by aggrieved property owners under the "taking" clause, no interest requiring special judicial protection is involved. Rather, the courts are being asked to upset a balancing involving complex economic factors typically asserted by competing interests within the real estate development community itself (e.g., should new residential subdivisions or shopping centers be allowed on the periphery of the community where they might siphon population and trade away from the downtown area and concurrently increase public infrastructure costs). The legislative and administrative halls, not the courts, are the appropriate forum for resolving such disputes among such powerful economic interests.

Also, in Village of Arlington Heights v. Metro Housing Corp., 429 U.S. 252 (1977), it was emphasized that legislative decisions were entitled to substantial deference by the judiciary:

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality.

Id. at 265 (emphasis added).

The Court's most recent and comprehensive discussion of land use regulation and "taking" is Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978). Most notably, this Court reaffirmed the traditional deference paid zoning regulation.

> More importantly for the present case, in instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contem-

> plated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. See Nectow v. Cambridge . . . . Zoning laws are, of course, the classic example, see Euclid . . . (prohibition of industrial use); Gorieb v. Fox . . . (requirement that portions of parcels be left unbuilt); Welch v. Swasey . . . (height restriction), which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property. See Goldblatt v. Hempstead, supra, at 592-93 . . . and cases cited; see also Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 674 n.8 . . . .

Id. at 125 (citations omitted).

Agins' amici cite dozens of scholars who have proposed complex schemes for recapturing the increases in land value resulting from government regulation, and using these funds to compensate losses caused by regulation.[3/] The proposals focus on political and fiscal problems and intricate valuation and remedial mechanisms which

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3/ E.g., D. Hagman & D. Misczynski, Windfalls for Wipeouts: Land Value Capture and Compensation (1978).

are most properly addressed by the state legislatures. Regardless of the argued desirability of any of these programs, few, if any, commentators realistically expect them to be implemented by the courts.

The California Supreme Court recognized this in HFH, Ltd. v. Superior Court, 15 Cal.3d 508, 542 P.2d 237, 125 Cal.Rptr. 365 (1975), where the court reviewed voluminous amici briefs urging the adoption of various remedial schemes to compensate "takings." The court concluded:

> We are urged in this case to redefine the state and federal constitutional requirements of just compensation and to require payment for any zoning action which results in the substantial diminution of market value. That we do not do so reflects less our belief that no problems exist with the present law in this area than our conviction that legislative rather than judicial action holds the key to any useful reform. The welter of proposals for action to remedy the inequities in the scheme of land use regulation which falls short of invoking constitutional protection bear ample witness to the ferment in this area. Without passing on the desirability or legality of any of the proposed plans, we note that

> almost without exception they require legislative action for their implementation. The complexity of the schemes proposed and the administrative machinery required for their effectuation obviously exceed anything readily feasible as a judicial remedy. Thus even if we were wholeheartedly to concede the wisdom of these plans, they would lie beyond our remedial powers.

15 Cal.3d at 521-22 (emphasis added) (citations omitted).[4/]

Many leading commentators have concluded that "reform" in this difficult

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4/ The HFH court quoted from Professor Michelman's leading article on just compensation, as follows:

> [T]he courts recognize that they cannot, through the enunciation of doctrine which decides cases, adequately stake out the limits of fair treatment; that if the quest for fairness is left to a series of occasional encounters between the courts and public administrators it can but partially be fulfilled; and that the political branches, accordingly, labor under their own obligations to avoid unfairness regardless of what the courts may require.

Id. at 522, citing Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1252 (1967).

area must come from the legislatures.

Professor Costonis concludes in his article, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 Colum. L. Rev. 1021, 1048-49 (1975):

> In the last analysis, it is the job of legislatures to hear the claims of competing groups and to accommodate their legitimate interests as fairly as possible within a normative framework understandable both to these groups and to reviewing courts. Ultimately, it is their job to take the leading role in forging a value consensus concerning entitlements of land ownership in 20th Century America. Their failure to get on with the job is the root cause of the nation's taking quandary.

See also Van Alstyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria, 44 So. Cal. L. Rev. 1, 72-73 (1970); Van Alstyne, Statutory Modification of Inverse Condemnation: The Scope of the Police Power, 19 Stan. L. Rev. 727 (1967); Costonis, Development Rights Transfer: An Exploratory Essay, 83 Yale L. Rev. 75 (1973); Rose, A Proposal for the Separation and Marketability of Development

Rights as a Technique to Preserve Open Space, 2 Real Est. L. J. 635 (1974) (all proposing legislative action). See generally, F. Bosselman, D. Callies, J. Banta, The Taking Issue (1973).

The fundamental flaw in allowing inverse condemnation for mere governmental regulation is that courts cannot provide for any recapture of "windfalls" bestowed on landowners by regulations enhancing their property value. Of course, all zoning affects property values -- some parcel values are increased, others decreased. In general, however, zoning enhances the value of all land in the community. Requiring that municipalities compensate landowners whose property is decreased creates a lopsided scheme where the state "insures" landowners against losses from zoning regulations without receiving funds from benefitted landowners to finance the scheme.

C. The State's Decision on an Issue of Remedies for Improper Use of the "Police Power" Should Not Be Overturned Unless the Relief Is Inadequate to Protect Federal Constitutional Rights.

As noted, the instant case involves federal review of a state court decision in an area recognized to be of unique importance to states and localities. But it also calls into question the ability of the states to fashion different, but equally effective, remedies for the redress of federal constitutional rights in the state courts. In considering whether to require nationwide uniformity on the question of money damages as a universally available remedy, amici APA respectfully suggest that this Court consider the impact of such a decision on the institutional autonomy of the state legislative and judicial systems.

In considering claims which seek to "constitutionalize" particular remedies to redress loss of federal rights, this Court often considers the adequacy of

state remedies available.[5/] State-fashioned remedies have been ruled inadequate to protect federal rights only when such remedies were found to

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5/ See Stone v. Powell, 428 U.S. 465 (1976) (adequate opportunity for fair litigation of state prisoner's fourth amendment claim precludes federal habeus corpus relief); Paul v. Davis, 424 U.S. 693 (1976) (adequacy of state remedy considered in determining whether state-inflicted injury to a person's reputation violates 42 U.S.C. § 1983); Ingraham v. Wright, 430 U.S. 651 (1977) (denial of federal relief against corporal punishment based in part on fact that state's common law remedies proved sufficient to preserve "due process of law"). See also McCoy v. Shaw, 277 U.S. 302 (1928) (denial of relief based on state law of remedies upheld); Mellon Co. v. Charles McCafferty, 239 U.S. 134 (1915) (same). Cf. Miranda v. State of Arizona, 384 U.S. 436, 490 (1966) ("Congress and the states are free to develop their own safeguards for the privilege [against self incrimination] so long as they are fully as effective as those described above."); J.I. Case Co. v. Borak, 377 U.S. 426, 434 (1964) (inference of a private cause of action from a federal statute should be based in part on whether the cause of action is one traditionally relegated to the states, in a legal field that is basically their concern).

deny all meaningful relief to a plaintiff.[6/]

Nor should the property owners in the instant case be afforded a money damage remedy inferred by necessity from the federal constitution as in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). In Davis v. Passman, 99 S.Ct. 2264 (1979), the most recent case in which Bivens damages were allowed, this Court considered, inter alia, three primary factors as relevant to whether such damages were required: (1) For Davis as for Bivens, relief was "damages or nothing." Id. at 2277, citing Bivens, 403 U.S. at 410 (Harlan, J. concurring). As will be seen, the Aginses, in contrast, had other effective remedies available; (2) In Davis, deference to state court

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6/ E.g., Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule applied to states on the grounds that without it, the fourth amendment would be a mere "form of words"); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 350 U.S. 91 (1930) (state law effectively left party without any remedy); Ward v. Bd. of County Comm'rs, 253 U.S. 17 (1920) (same).

adjudication did not "serve the purposes of federalism." Id. at 2277 n.23. As demonstrated in this section, land use control is almost exclusively a state and local governmental function, and the Agins case raises critical issues of federalism; (3) In Davis, relief in damages was "judicially manageable" and "without difficult questions of valuation." Id. at 2277. Of course, the valuation problems in inverse condemnation actions such as the instant case are not only formidable, but they are overwhelming.

D. California's Decision to Limit Landowners to Mandatory, Declaratory and Injunctive Relief in Its State Courts to Remedy Unconstitutional Zoning Ordinances Adequately Protects Federal Constitutional Rights.

Appellants here have not been denied the opportunity to obtain an effective, meaningful remedy for protecting their constitutional rights as they claim. The California Agins ruling simply limits appellants to mandatory, declaratory and injunctive relief to remedy any constitu-

tional violations perceived in the state local planning and zoning regulations as they might apply to appellants' property.[7] Such relief is not only effective; it is the traditional, and indeed only, remedy this Court has granted in cases of unconstitutional land use regulation. Nectow v. City of Cambridge, 277 U.S. 183 (1928); Pennsylvania Coal Co. v. Mahon,

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7/ Of course, prior to seeking judicial relief from the California courts, the Aginses here could have, but did not, seek legislative or administrative relief from the City. For example, they could have applied to the city council for a rezoning of their property, or, indeed, they could have sought to begin the administrative procedures necessary to entitle them to develop as many as five dwelling units on their five acres. Moreover, no attempt was apparently made by the Aginses to obtain a variance based on hardship or other special circumstances, or a conditional use permit or other exception to the zoning ordinance -- categories of administrative relief commonly granted in California by administrative bodies without need for city council approval. See D. Hagman, California Zoning Practice 258-312 (Calif. Cont. Educ. of the Bar 1975).

260 U.S. 393 (1922).[8]

The claim of appellants that meaningful equitable relief and "invalidation of regulations is virtually unobtainable" in California, Appellants' brief, at p. 44, is wholly without merit. For example, the California appellate courts have frequently invalidated arbitrary and discriminatory "spot-zonings" at the behest of aggrieved property owners. E.g., Hamer v. Town of Ross, 59 Cal.2d 776, 382 P.2d 375, 31 Cal.Rptr. 335 (1963); People ex rel. Dept. of Pub. Works v. Southern Pac. Transp. Co., 33 Cal.App.3d 960, 109 Cal.Rptr. 525 (1973). They will closely scrutinize and invalidate local zoning ordinances that have adverse "exclusionary" impacts upon regional housing patterns. Associated Home Builders v. City of Livermore, 18 Cal.3d 582, 557 P.2d 473, 135 Cal.Rptr. 41 (1976). Cf. G&D Holland Constr. Co. v. Marysville, 12 Cal.App.3d 989, 91 Cal.Rptr. 227 (1970). Similarly, they have often

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8/ See F. Bosselman, D. Callies, J. Banta, The Taking Issue (1973).

mandated that construction permits be granted by reluctant local authorities where property owners have obtained constitutional or statutory "vested" rights to build. E.g., Youngblood v. Bd. of Supervisors, 22 Cal.3d 644, 586 P.2d 586, 150 Cal.Rptr. 242 (1979); Roman Catholic Welfare Corp. v. Piedmont, 45 Cal.2d 325, 289 P.2d 438 (1955); Sunset View Cemetary Ass'n v. Kraintz, 196 Cal. App.2d 115, 16 Cal.Rptr. 317 (1961); McCombs v. Larson, 176 Cal.App.2d 105, 1 Cal.Rptr. 140 (1959); Munns v. Stenman, 152 Cal.App.2d 543, 314 P.2d 67 (1957); Woodie v. Byram, 132 Cal.App. 2d 651, 282 P.2d 920 (1955). Cf. Trans-Oceanic Oil Corp. v. Santa Barbara, 85 Cal.App.2d 776, 194 P.2d 148 (1948). Declaratory judgments and injunctions against the enforcement of local zoning laws unconstitutionally infringing on private property rights have also often been granted. Furey v. City of Sacramento, 24 Cal.3d 862, 598 P.2d 844, 157 Cal.Rptr. 684 (1979); San Diego Coast Regional Comm'n v. See the Sea, Ltd., 9 Cal.3d 888, 513 P.2d 129, 109 Cal.Rptr. 377 (1973); Kissenger v. Los Angeles,

161 Cal.App.2d 454, 327 P.2d 10 (1958); McCaslin v. Monterey Park, 163 Cal.App. 2d 339, 329 P.2d 552 (1958); Greenfield v. City Planning Comm'rs., 6 Cal.App.2d 515, 45 P.2d 219 (1935). And administrative mandamus is also available to test the constitutional validity of local land use controls. Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal.Rptr. 79 (1973).9/

9/ It is also noteworthy that California has developed extraordinarily speedy and efficient procedures for issuance of these remedies. For example, writs of mandate may be filed in any court, including the appellate courts themselves. Cal. Const. Art. VI, § 10. After filing a petition for the writ, the petitioner simply obtains an alternative writ which includes an order to show cause to the defendant entity. The hearing on the return to the writ serves as the trial. Cal. Code of Civil Procedure §§ 1087, 1088. See generally, 5 Witkin, California Procedure §§ 149, 164, 166, 168, 170 (2d ed. 1971). Many California trial courts have created special departments with specialized procedures whose sole purpose is to hear and determine applications for extraordinary relief, such as writs of mandate, and applications for preliminary injunctions. See e.g., Los [cont'd.]

Furey v. City of Sacramento, 24 Cal. 3d 862, 598 P.2d 844, 107 Cal.Rptr. 648 (1979), a post-Agins case, is particularly instructive. There landowners had paid over $1 million on special assessment bond obligations for sewer lines in anticipation of residential development. The city adopted an open space element to its general plan and amendments to its zoning ordinance placing four-fifths of the Fureys' land in an agricultural zone. The California Supreme Court denied money damages for the alleged "taking" (citing Agins), but held that the landowners were entitled to "declaratory relief or mandate precluding the application of the subject land use regulations to plaintiffs," id. at 877-78, if they established that the open space controls prevented them from realizing "the special benefits generated by the assessment district in which they

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9/ [cont'd.] Angeles County Superior Court, Manual of Policy and Procedure for the Writs and Receivers Department of the Superior Court for the County of Los Angeles (1975).

have substantially contributed." Id. at 877.

Furey shows that the California courts continue to be willing to invalidate unconstitutional ordinances as they apply to an individual landowner. The relief granted there was a flexible, carefully balanced order which alleviated the hardship to the plaintiffs while giving the defendant city an opportunity to avoid a costly "forced compensation." Such relief contrasts sharply with the rigid, all-or-nothing approach followed by courts in granting money damages.10/

10/ Compare Arastra Limited Partnership v. City of Palo Alto, 401 F.Supp. 962 (N.D. Cal. 1975), where, after judgment for plaintiffs on an inverse condemnation action, the city paid $7.5 million, the price Arastra originally paid for the property. Even Professor Hagman, an outspoken proponent of allowing certain types of money damages for certain "regulatory takings," acknowledges the extremity of this outcome: "By regulating for open space, the court held the city purchased the property in fee at its value assuming substantial development. While one wants to attract the city's attention by requiring compensation, there is no need to use [cont'd.]

Unlike inverse condemnation awards, the relief allowed in California gives legislatures an opportunity to weigh costs and benefits and to choose from a variety of options. The government may enact less severe zoning regulations, exercise eminent domain and acquire the property, combine regulation with compensation, or abandon its regulations entirely. Such careful balancing is obviously more properly done by the legislatures than by the courts.

10/ [cont'd.] a bat that knocks the city out." D. Hagman & D. Misczynski, Windfalls for Wipeouts: Land Value Capture and Compensation 303 (1978).

II. THE CALIFORNIA LEGISLATURE HAS ENACTED STATUTORY REFORMS IN THE PLANNING AND ZONING FIELD TAILORED TO CALIFORNIA'S CIRCUMSTANCES -- THE COURTS SHOULD BE SUPPORTIVE OF THESE EFFORTS TO PROMOTE THE DEVELOPMENT AND IMPLEMENTATION OF RATIONAL AND FAIR COMPREHENSIVE PLANS, AND SHOULD NOT CREATE NOVEL AND UNNECESSARY CONSTITUTIONAL REMEDIES WHICH UNDERMINE COMPREHENSIVE PLANNING.

A. Early Zoning Practice in California.

California has long been at the forefront of the nation in fostering sound local government planning and zoning techniques. Local zoning existed in California as early as 1885. See In re Hang Kie, 69 Cal. 149, 10 P. 327 (1886). Los Angeles became the most fully zoned city in the United States between 1904 and 1915. D. Hagman, California Zoning Practice 4 (Calif. Cont. Educ. of the Bar 1969). In 1917, the California Legislature enacted the state's first zoning act, making California one of the first states to have such legislation. Id.11/

11/ California's basic zoning legislation differs in many pertinent [cont'd.]

In 1925, the California Supreme Court rendered its landmark decision in Miller v. Board of Public Works, 195 Cal. 497, 234 P. 381 (1925). There, the California Court upheld the overall constitutionality of local zoning in a manner almost identical to that taken by this Court two years later in Village of Euclid v. Ambler Realty Co.:

> [T]he police power is not a circumscribed prerogative, but is elastic and in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race.
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> * * *
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> The increase of our urban population makes regulation necessary. As the congestion of our cities increases, likewise do the problems of traffic control and police, fire, and health protection. Comprehensive and systematic zoning is the successful solution of these problems and obviously tends thereby to affirmatively promote the public welfare.
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> * * *
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> Every intendment is to be indulged by the courts in favor of the validity of its exercise, and unless the measure is clearly oppressive it will be deemed to be within the purview of that power. It is only when it is palpable that the measure in controversy has no real or substantial relation to the public health, safety, morals, or general welfare that it will be nullified by the courts. The courts may differ with the legislature as to the wisdom and propriety of a particular enactment as a means of accomplishing a particular end, but as long as there are considerations of public health, safety, morals, or general welfare which the legislative body may have had in mind, which have justified the regulation, it must be assumed by the court that the legislative body had those considerations in mind and that those considerations did justify the regulation.

195 Cal. at 485, 489, 490.

During the ensuing fifty years, when this Court uniformly refused to review state zoning cases, the California appellate courts considered many cases involving the constitutionality of a wide array of so-called "downzonings" attacked by affected property owners.

11/ [cont'd.] respects from most state zoning enabling acts. See D. Hagman, California Zoning Practice 5 (Calif. Cont. Educ. of the Bar 1969).

Usually[12] but not always[13] the local government's exercise of the police power in the zoning context has been

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12/ E.g., Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal.2d 515, 370 P.2d 342, 20 Cal.Rptr. 638, appeal dismissed, 371 U.S. 36 (1962) (private property zoned to exclude quarrying which was only profitable use that could be made of the property); McCarthy v. City of Manhattan Beach, 41 Cal.2d 879, 264 P.2d 932 (1953) (private beachfront property zoned commercial "beach recreational" with only permitted structures being a small fence and a life guard tower); Turner v. County of Del Norte, 24 Cal.App.3d 311, 101 Cal. Rptr. 93 (1972) (open space flood plain zoning); Morse v. County of San Luis Obispo, 247 Cal.App.2d 600, 55 Cal.Rptr. 710 (1967) (private property downzoned to one dwelling unit per five acres); Metro Realty v. County of El Dorado, 222 Cal.App.2d 508, 35 Cal.Rptr. 480 (1963) (interim zoning ordinance restricting development within potential development sites).

13/ E.g., Peacock v. County of Sacramento, 271 Cal.App.2d 845, 77 Cal.Rptr. 391 (1969) (ordinance preventing building or even agricultural use of land for over five years required compensation); Sneed v. County of Riverside, 218 Cal. App.2d 205, 32 Cal.Rptr. 318 (1963) (airplane flight easement required compensation). See also cases cited, supra, at pp. 29 to 31.

upheld.

More recently, the California appellate courts have been confronted with legal issues relating to the constitutionality of actions taken by local authorities pursuant to new statutory local planning and zoning requirements. Because these statutory reforms constitute the basic legislative framework under which the City of Tiburon was functioning when it rezoned the Agins property here, it is important to understand the background leading to their enactment.

B. Legislative Reforms in Local Planning and Zoning Practices: the Mandate That Rational and Fair Comprehensive Local Land Use Plans Be Developed and Implemented.

Although local zoning was initially designed to be comprehensive in nature, as time passed and practice developed, most cities and counties throughout the nation failed to associate subsequent rezonings with comprehensive planning policies.

> Local planning commissions and city councils regularly changed zoning maps giving little thought to transportation policy, growth projections, capital improvement programs or any of the issues central to a modern general plan. The results of such ad hoc practices were inconsistent and unfair zoning decisions which bore little relation to serious planning.

Int'l City Mgmt. Ass'n, The Practice of Local Government Planning (So, Stollman, Beal and Arnold eds. 1979) at 419 [hereinafter The Practice of Local Government Planning].

But increasingly, through the 1970s, state legislatures and courts began to perceive that these sorts of local practices could lead to abuses, and thus sought to impose requirements for a greater measure of reason and fairness on the local land use decision-making process. In so doing, they repeatedly turned to the local general plan as the fundamental building block for a rational and fair system of land use control.

The highly influential International City Management Association summarized these important national legis-

lative and judicial trends in its landmark work, The Practice of Local Government Planning:

> In the 1970s a variety of forces combined to breathe new life into the idea of the city plan.
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> * * *
>
> This is a fairly recent phenomenon that has resulted from states mandating their local governments to plan, or courts insisting that some form of planning document be presented as the basis for land use controls.
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> This trend toward the required plan gained considerable momentum during the decade of the 1970s and promises to have a profound and lasting effect on our views of planning and plans. The trend reflects, more than anything else, a coming of age of planning and a recognition that a plan can and should really mean something. It reflects a change in attitudes toward the plan. The plan is no longer a formality, to be prepared and forgotten. It is rapidly becoming a requirement -- and one that must contain certain elements . . . .
>
> This trend appears to result primarily from a shifting attitude on the part of the courts as they review land use regulations . . . .
>
> Two major changes have occurred in land use control practices which have eroded the willingness of the courts to accept a zoning ordinance without reference to a city plan. The first change was the increasing use of flexible land use con-

trols. . . . The zoning ordinance was no longer prescriptive on its face but was merely a set of procedures one had to go through to find out what might be done with one's property. It was a system that could be subject to abuse.

The second change in land use control practice has been the increasing adoption of growth management programs . . . . Now that land use control has become a finely tuned flexible tool for controlling the most minute detail of development, including timing, a plan has become increasingly more important.

[A]s the status of the plan changes increasingly toward that of the impermanent constitution, it will become more important, it will be taken more seriously, and it will have a greater effect on people's lives.

Id. at 169-72.

Thus, throughout the 1970s, many state legislatures strengthened the relationship between zoning and the local comprehensive plan -- mandating that there must now be "consistency" between the comprehensive plan and subsequent rezonings.[14/]

14/ Currently, there are 18 states that have some form of required consistency between zoning and comprehen- [cont'd.]

Indeed, even where state legislatures did not expressly enact such "consistency requirements," state courts themselves judicially imposed "consistency requirement" standards.[15/] See generally J.F.

14/ [cont'd.] sive local plans. E.g., Alaska Stats. § 29.33.070 (1978 Supp.); Del. Code Ann. 9 § 6802,22 §701 (1978 Supp.); D.C. Code § 1-1002(a) (1978 Supp.); Fla. Stat. Ann. § 163.3161-3211 (Harrison 1978); Hawaii Rev. Stat. §226-1 (1978 Supp.); Idaho Code Ann. §§ 67-6501 (1979 Supp.); Ind. Ann. Stat. Code §§ 18-7-2-1, 18-7-5-1; Ky. Rev. Stat. Ann. §§ 100.137, 100.213; Me. Rev. Stat. Ann. §§ 4511, 4961 (1978); N.J. Stat. Ann. §§ 40:55D-23, 40:55D-62(a) (West Supp. 1977); Neb. Rev. Stat. §§ 19-901, 23-114.03 (1977); Ore. Rev. Stat. §§ 227.020, 215.020, 197.175; S.D. Compiled Laws, §§ 11-6-3, -14, 1122 (1978 Supp.)

15/ E.g., Baker v. City of Milwaukee, 533 P.2d 772 (Wash. 1975); Palazzi v. State, 319 A.2d 658 (R.I. 1974); Fasano v. Bd. of County Comm'rs of Washington County, 264 Ore. 574, 507 P.2d 23 (1973). See also Dalton v. City and County of Honolulu, 51 Hawaii 400, 462 P.2d 199 (1969); South of Sunnyside Neighborhood League v. Bd. of Comm'rs, 280 Ore. 3, 569 P.2d 1063 (1977); Hines v. Pinchback-Halloran Volkswagon, Inc., 513 S.W.2d 492 (Ky. 1974). Cf., Udell v. Haas, 21 N.Y.2d 463, 288 N.Y.S.2d 888 (1968).

DiMento, Improving Development Control Through Planning: The Consistency Doctrine, 5 Colum. J. Envt'l L. 1 (1978); Mandelker, The Role of the Local Comprehensive Plan in Land Use Regulation, 74 Mich. L. Rev. 899 (1976); Sullivan & Kressel, Twenty Years After -- Renewed Significance of the Comprehensive Plan Requirement, 9 Urb. L. Ann. 69 (1975); Note, Urban Planning and Land Use Regulation: The Need for Consistency, 14 Wake Forest L. Rev. 81 (1978); The Practice of Local Government Planning, supra, at 171, 419.

In California, problems of a like nature developed in the practice of local government planning and zoning, and the California Legislature responded with comparable statutory reforms. In 1968, for example, the State Office of Planning reported in its State Development Plan Program, at 259-60, that:

> Although preparation of a General Plan is required by law, only about two-thirds of the cities of the state have adopted one. The plans exhibit major gaps in responding to primary development policy needs . . . . A substantial number of cities still use zoning

> as completely unrelated to long-range planning objectives.
>
> Probably less than 20 percent of all counties in the state can be considered to have thoroughly prepared, up-to-date, effective general plans.

Two years later, the California Legislature's Joint Committee on Open Space Lands undertook an extensive survey of local government planning efforts and concluded that "most local plans are development oriented. Planning for urban expansion frequently dominates planning for open space preservation." Cal. Joint Comm. on Open Space Lands, Final Report (1970) at 23-24. Moreover, the prevailing practice among local agencies was to develop "two parallel plans" -- one the official general plan and the other the "de facto" plan drawn by the local body as it administers zoning and other land use programs." Id. at 24. According to the Final Report, this "dichotomy" between the official general plan and the implementing measures theoretically designed to carry it out should be ended. There should be "unity" between the official plan and the de facto implementing plan.

Id. "The best plan poorly followed can be of little value . . . . Until local actions are required to comply with the appropriate local plan, the danger of thwarting planning goals will continue . . . ." Id.

Consequently, the California Legislature enacted new legislation in 1970 amending the Planning and Zoning Law to require that local governments incorporate extensive open space planning elements into the local general plan, Cal. Gov't. Code §§ 65560-65565 (West 1980).16/ Moreover, for the first

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16/ Article 10.5 of the California Government Code entitled "Open-Space Lands" (Cal. Gov't. Code §§ 65560-65570 (West 1980)) was adopted by the California Legislature "to assure that every city and county will prepare and carry out open-space plans which, along with state and regional open-space plans, will accomplish the objectives of a comprehensive open-space program." Id. § 65562(b).

The preservation of open space land was found necessary "not only for the maintenance of the economy of the state, but also for the assurance of the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural [cont'd.]

time, the Legislature mandated that such future land use decisions as zoning and subdivision map approvals must be "consistent with" those open space elements. Id. §§ 65566, 65567, 65910. This new "consistency requirement" was extended a year later to ensure that henceforth all zoning and subdivision map approvals must be "consistent with" the entire general plan. Id. §§ 65860(a), 66451,

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16/ [cont'd.] sources." Id. § 65561(a). The open space lands protected by the article include, inter alia, sensitive natural resources including areas required for the preservation of plant and animal life; open space for the managed production of resources including "forest lands, rangeland, agricultural lands and areas of economic importance for the production of food or fiber"; areas required for recharge of ground water basins, areas important to the management of commercial fisheries, and areas containing major mineral deposits; open space for public health and safety, including areas which require special management or regulation because of hazardous or special conditions such as earthquake fault zones, unstable soil areas, flood plains, watersheds, areas presenting high fire risks, and areas required for the protection and enhancement of air quality. Id. § 65560.

66474.)[17]

More recently, the California Legislature unequivocally declared:

> Decisions involving the future growth of the state, most of which are made and will continue to be made at the local level, should be guided by an effective planning process, including the local general plan, and should proceed within the framework of officially approved statewide goals and policies directed to land use, population growth and distribution, development, open space, resource preservation and utilization, air and water quality, and other related physical, social and economic development factors.

Id. § 65030.1.[18]

17/ The California Legislature's Joint Assembly Subcommittee on Premature Subdivisions stated in its 1971 Staff Recommendations for Legislative Action, at 3: "At present, local zoning ordinances are not required to be consistent with city and county general plans. . . . [I]t is neither wise nor reasonable to permit this type of land use policy to continue any longer."

18/ The California statute also requires that, in implementing their general plans, local agencies must consider "the housing needs of the region" and balance these against "the public service needs of its residents and available fiscal and environmental [cont'd.]

C. California Court Response to the New Planning and Zoning Statutory Reforms -- The Constitutionality of Local Government Action Taken Pursuant to These Mandates.

When confronted for the first time with a constitutional challenge to local government action implementing the planning and zoning requirements imposed

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18/ [cont'd.] resources." Id. §§ 65863.5, 66412.2. Further, since 1965, it has been required that all cities and counties include a housing element in their comprehensive, local general plan which makes "adequate provision for the housing needs of all economic segments of the community." Cal. Gov't. Code § 65302(c) (West 1980) (emphasis added). This element must contain "standards and plans for the improvement of housing" and must provide adequate sites for housing. The Housing Element Guidelines promulgated by the California Department of Housing and Community Development (HCD), define the "community" to be encompassed by the local housing element to include "a fair share of those market area households . . . who would live within the local jurisdiction were a variety and choice of housing appropriate to their needs available." Cal. Admin. Code, tit. 25, § 6418 (West 1980). The HCD Guidelines' emphasis on a regional "fair share" approach to housing essentially codifies the landmark case of Southern Burlington [cont'd.]

on local governments by these statutory reforms, the California Supreme Court observed:

> The elimination of open space in California is a melancholy aspect of the unprecedented population increase which has characterized our state in the last few decades . . . . These factors have been recognized by the recent adoption of Article XXVIII of the Constitution, which provides that it is in the best interest of the state to maintain and preserve open space lands to assure the enjoyment of natural resources and scenic beauty for the economic and social well-being of the state and its citizens. Statutes which further the underlying policy expressed in the constitutional section must be upheld whenever possible in order to effectuate its salutary purposes.

Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek, 4 Cal.3d 633, 638-39, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).[19]

Two years later, the California Supreme Court stated: "The deleterious consequences of haphazard community

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18/ [cont'd.] County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, cert. denied, 423 U.S. 808 (1975) (invalidating zoning ordinance which discriminated against low and moderate cost housing).

In Associated Home Builders v. City of Livermore, 18 Cal.3d 582, 557 P.2d 473, 135 Cal.Rptr. 41 (1976), the California Supreme Court held that local zoning practices which have "exclusionary" effects on housing within a region are subject to judicial review in California to ensure that they are consistent with the overall general welfare within the region. Although appellants and their amici darkly hint in their briefs that the Tiburon zoning ordinance has "exclusionary" impacts on lower-income families, it is noteworthy that these arguments were not made to the California state courts despite the California Supreme Court's ruling that they would actively entertain such claims.

19/ See also State of California v. Superior Court (Veta), 12 Cal.3d 237, 524 P.2d 1281, 115 Cal.Rptr. 497 (1974) (upholding constitutionality of California Coastal Commission); People ex rel. Younger v. County of El Dorado, 5 Cal.3d 480, 487 P.2d 1193, 96 Cal.Rptr. 553 (1971) (upholding constitutionality of Lake Tahoe regional planning agency); Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Comm'n., 11 Cal.App.3d 557, 89 Cal. Rptr. 897 (1970) (upholding constitutionality of regional planning agency for San Francisco Bay).

growth in this state and the need to prevent further random development are evident to even the most casual observer. The Legislature has attempted to alleviate the problem by authorizing the adoption of long-range plans for orderly progress." Selby Realty Co. v. City of San Buenaventura, 10 Cal.3d 110, 121, 514 P.2d 111, 109 Cal.Rptr. 799 (1973). According to Selby, the threat of inverse condemnation actions brought against local governments by aggrieved property owners who challenged the general plan's application to their parcels could bring about a situation where "the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land." Id.

Similarly, in HFH, Ltd. v. Superior Court of Los Angeles County, 15 Cal.3d 508, 542 P.2d 237, 125 Cal.Rptr. 365 (1975), the California Supreme Court faced a constitutional challenge to another local government action. There, a city had recently adopted a newly

revised comprehensive general plan pursuant to the statutory scheme described, indicating low-density residential uses for the parcel in question. The plaintiffs property owners sold the parcel to a buyer wishing to make commercial use of the property and sought a rezoning for commercial uses. Instead, the city rezoned the parcel from agricultural to low-density residential uses. In writing what to date has been the leading California Supreme Court decision on the issue, Mr. Justice Tobriner noted that, in past zoning cases, mandamus setting aside an unconstitutional rezoning had been the remedy traditionally sought and, in appropriate cases, given. Money damages had never been considered an appropriate remedy. 15 Cal.3d at 512, 520, 523.20/ His

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20/ Appellants and their amici characterize California's HFH and Agins opinions as mavericks, out of step with the rest of the state courts in the country. In fact, many jurisdictions have adopted positions similar to California's on the issue of money damages for allegedly "confiscatory" land use regulation, including: [cont'd.]

opinion cogently describes the reciprocal benefits and burdens achieved by comprehensive planning and zoning, and the potential mischief that such money damage awards posed:

> In this case, as in most instances, zoning is not an arbitrary action depriving someone of property for the purpose of its use by the public or transfer to another; rather it involves reciprocal benefits and burdens which the circumstances of this case well illustrate. The shopping center which plaintiffs seem at various times to have contemplated erecting, would derive its value from the existence of residential housing in the surrounding area. That residential character of the neighborhood, we may assume, results in part from the residential zoning of the area around the tract in question. Plaintiffs in this case

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20/ [cont'd.] Cardon Oil Co. v. City of Phoenix, 122 Ariz. 102, 593 P.2d 656 (Ariz. 1979); Eck v. City of Bismarck, 283 N.W.2d 193 (N.D. 1979); Davis v. Pima County, 121 Ariz. 343, 590 P.2d 459 (Ariz.App. 1978); Fred R. French Inv. Co., Inc. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381 (1976); Gold Run, Ltd. v. Bd. of County Comm'rs, 554 P.2d 317 (Colo.App. 1976); Mailman Development Corp. v. City of Hollywood, 286 So.2d 614 (Fla.App. 1973).

> therefore find themselves in a somewhat uncomfortable position: they wish to reap the benefit in the form of higher market values of their land, of the restrictive zoning on other properties, but do not wish to bear the reciprocal burden of such zoning when it applies to their property. They thus would avoid the enforcement of residential zoning on their property while benefiting from its enforceability as to other property.
>
> The long settled state of zoning law renders the possibility of change in zoning clearly foreseeable to land speculators and other purchasers of property, who discount their estimate of its value by the probability of such change.

Id. at 521-22.21/

21/ Similarly, in Carty v. City of Ojai, 77 Cal.App.3d 329, 143 Cal.Rptr. 506 (1978), the Court of Appeals faced a situation where certain property at the outskirts of a small city had been annexed by it and zoned for commercial shopping center purposes. Three years later, the city employed professional planning consultants who prepared a study recommending that further commercial development outside the downtown business district be curbed, and that the downtown area be redeveloped. The city amended its plan to incorporate the recommendations of the report, and subsequently "downzoned" plaintiffs' property to allow continued [cont'd.]

And, in the instant case, the California Supreme Court again very properly considered the plaintiff property owners' constitutional claim for inverse condemnation money damages in the context of the California State Legislature's statutory planning and zoning reforms. "Tiburon, like every other city in California, is required by state law to prepare a general plan . . . . Routinely, the development of a general plan entails a careful examination of numerous social and economic

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21/ [cont'd.] commercial uses, but to preclude development of shopping centers. The court rejected the property owners' claim that the downzoning was unconstitutional, observing that the downzoning had to be viewed in the "contextual setting" of the implementation by the city of its general plan. 77 Cal.App.3d at 338. Many state courts from other jursidictions have recently upheld the constitutionality of similar downzonings designed to implement comprehensive plan policies. E.g., Montgomery County Council v. Dist. Land Corp., 274 Md. 691, 337 A.2d 712 (1975); Horizon Adirondack Corp. v. State, 88 Misc.2d 619, 388 N.Y.S.2d 235 (Ct.Cl. 1976); Culver v. Dagg, 20 Or.App. 647, 532 P.2d 1127 (1975).

factors." 24 Cal.3d at 270.

A suburb of San Francisco with a population of about 6,000 persons and an area of 1,676 acres, the City of Tiburon had carefully prepared, with the assistance of planning experts, a comprehensive general plan pursuant to these state laws. Id. at 270-71. The plaintiffs' parcel (located on the ridge land overlooking San Francisco Bay) was rezoned in accord with this plan to allow residential development at a density range between one unit per acre and five units per acre, depending on the results of more detailed planning studies which would be performed when and if the property owners applied for developmental permits. Id. at 271. Without applying for any developmental permits under this zoning ordinance, and indeed without seeking to change the zoning classification, plaintiffs thereupon filed an inverse condemnation claim for $2 million, arguing that their property had thereby been "taken" without just compensation.

Mr. Justice Richardson's Agins opinion follows the theme of previous

opinions: "Community planners must be permitted the flexibility which their work requires." Id. at 275. Court authorization of an inverse condemnation remedy for money damages would have a "chilling effect" upon the exercise of local police regulatory powers "because the expenditure of public funds would be, to some extent, within the power of the judiciary." Id. at 276. The "threat of unanticipated financial liability" will inevitably intimidate local legislative bodies into adopting meaningless planning and zoning regulations which are "fiscally safe." Id. It would be a "usurpation of legislative power" for the courts to "force compensation." Id. "Invalidation, rather than forced compensation, would be the more expedient means of remedying legislative excess." Id. "In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appro-

priate relief under the circumstances." Id. at 276-77.

D. The Practical Implications on Comprehensive Local Planning and Zoning Occasioned by an Inverse Condemnation Remedy for Diminution in Value Resulting from Exercise of the Police Power.

The foregoing discussion has shown that California, like many states recently, has attempted to provide greater protection to the interests of property owners and the community at large by requiring preparation of comprehensive general plans and by requiring that individual zoning and other land use decisions be consistent with those plans. As an indication of the importance attached to this statutory scheme, it is noteworthy that California's cities and counties have spent many millions of dollars in preparing these revised and updated general plans and bringing their zoning into conformity with them.[22/] California obviously

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22/ A sampling of city and [cont'd.]

believes that this substantial financial investment in sound planning will reap substantial economic dividends from both an efficiency and equity standpoint. The California system is efficient because it promotes more rational land use management and allows coordination of local government capital investment policy with police power regulatory authority.[23/] It is equitable because

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22/ [cont'd.] county expenditures on advance planning for fiscal year 1977-78 shows: Los Angeles County $2,181,890; San Francisco City and County $514,644; San Diego County $2,066,608; Santa Clara County $688,163; Los Angeles City $1,557,921. Local Government Planning Survey, 1978 -- State of California (Governor's Office of Planning and Research, 1980). California has several hundred cities and many dozens of counties, so these figures give only an indication of the magnitude of the total dollar expenditure by local governments for these purposes.

23/ A local government obviously affects private land values through the pattern of its capital investments in public infrastructure. In some instances, the value of private lands are increased by these capital improvements (e.g., lands located adjacent to a new freeway off-ramp) while in [cont'd.]

it brings greater fairness to affected property owners and to the community at large when their competing needs (property owner vs. property owner; property owner vs. community) are balanced in the context of comprehensive planning, rather than ad hoc decisionmaking at the behest of a favored few. Ultimately, this increased rationality and fairness also brings about a further efficiency -- the need for fewer lawsuits by property owners, neighbors or other groups who feel their interests have been insufficiently considered by the decision-

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23/ [cont'd.] others, they are decreased (e.g., lands located near a new sewer treatment facility). It is difficult to see how property owners who are adversely affected by such capital expenditures can claim that the resulting indirect decline in value of their lands has resulted in a "taking" of their private property rights. Yet a decision allowing an inverse condemnation remedy for comparable declines in value resulting from police power regulatory actions would effectively prevent local governments from coordinating their police power regulations with their capital improvements projects (a common and desirable current practice) in order to provide compatible land use activities.

makers.

The potential "chilling effect" on this "preventative medicine" system posed by the spector of enormous money damage awards to aggrieved property owners bringing inverse condemnation suits is a very real and compelling one. The California Supreme Court has correctly observed that the threat of such damage actions could easily render this entire statutory scheme into a mere "paper tiger."

Nowadays, local general plans are often based on complex population forecasting techniques; they attempt to influence and direct predicted urban growth toward areas most suitable for urban expansion (e.g., toward existing infrastructure) and away from hazardous sites or sites containing significant natural resources. Yet previous zoning patterns in many cities date back to the days of "boosterism" and provide urban zoning for populations far in excess of any reasonable current estimates of future growth -- often in sites that current planning concepts consider highly undesirable for urban activities.

Such "overzoning" and wrong-site zoning exists in most California cities and counties.[24/] Consequently, many California property owners will be substantially affected by future zoning rollbacks necessitated by contemporary planning techniques and the state-mandated consistency requirement.

Moreover, the amounts of money each such affected property owner may claim as his diminution in value resulting from these zoning rollbacks can reach enormous magnitudes. Land and housing prices

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24/ For example, in the City of Los Angeles, the proposed general plan projects a growth from 3,025,151 persons in 1977 to 3,191,098 persons in the year 2000 based on current population trends. The general plan is designed to provide sites for 3,996,400 persons in 2000 -- about five times the capacity required to house the projected population growth. Current zoning capacity within the City, however, already provides sites for fully 6,274,700 persons. City of Los Angeles, Housing Element of the General Plan, p. 40 (Oct. 31, 1979). As a result, the City must necessarily undertake extensive "downzoning" activities to bring its zoning into the required "consistency" with the local general plan. Id. at 42.

have risen at enormous rates in California during the past five years.[25/]

Further, recent experience in California has shown the potentially disastrous effects on property and lives resulting from previous land use patterns and practices allowing extensive development of hazardous areas such as flood plains, seismic hazard lands, unstable hillside slopes and the like. It would be anomalous for local governments to be forced to compensate California property owners for diminutions in value to their lands occasioned by severe restrictions imposed to save the very lives and property of these same property owners. Yet even the prospect of large, unexpected damage awards based on such severe land use restrictions

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25/ The average sale price for an existing detached single-family home in Los Angeles County, for example, doubled between 1974 and 1978, while the average price for new homes went even higher. These prices were almost double the national average in major metropolitan areas. Los Angeles County Regional Planning Department, Proposed General Plan, p. IV-19 (Oct. 1978).

going "too far" may otherwise intimidate local planners into adopting meaningless regulations and abdicating their responsibility to prevent such harms.

Finally, this "chilling effect" may affect many other activities of police power regulation besides land use control activities. For example, in Dana Corp. v. State of California, 80 Daily Journal D.A.R. 743 (Cal. Ct. of Appeal, Second App. Dist., 2 Civ. No. 55838) (filed Mar. 13, 1980), the plaintiff property owner sought money damages on an inverse condemnation theory where the California Legislature had repealed certain legislation regulating the emission of oxides of nitrogen (NO_x) from automobiles and requiring the installation of devices designed to accomplish that end. Relying on the previous statute and the board's general solicitation of manufacturers, the plaintiff had invested substantial sums in developing and producing the devices. The Court of Appeal summarized the difficulty with plaintiff's contentions as follows:

> All that plaintiffs have alleged, or could allege, is that the Legis-

lature, in 1971, thought that requiring NOx devices on old cars was desirable and that, by 1974, the then Legislature thought that such a requirement was not desirable. A Legislature is not liable, nor is the state liable, for a change in its perception of public interest. Many things once thought desirable, or even to be encouraged, are later thought to be undesirable and to be discouraged. An investment under the earlier legislation is not protected against a change in the Legislature's views of desirability.

No matter under what ingenious theory put forth, the case at bench falls squarely within an express governmental immunity. Sections 818.2 and 821 of the Government Code read as follows:

"A public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law.

"A public employee is not liable for an injury caused by his adoption of or failure to adopt an enactment or by his failure to enforce an enactment."

Id. at 743. See also HFH, Ltd. v. Superior Court of Los Angeles County, supra, 15 Cal.3d at 519-21; Andrus v. Allard, 100 S.Ct. 318 (1979) (collecting federal cases).

CONCLUSION

Writing for the California Supreme Court in HFH, Ltd. v. Superior Court, supra, Mr. Justice Tobriner aptly summarized the unsympathetic and unsound legal position argued by the plaintiffs here in seeking inverse condemnation money damages for a mere diminution in value of their land resulting from the local government's exercise of the police power:

> Plaintiffs in this case desire a change in long standing principles of the law of just compensation; they ask that we hold municipal zoning bodies liable for full compensation for any fall in market price due to zoning actions. Yet plaintiffs can cite no case and little by way of other considerations to support their claim of entitlement to compensation by reason of a change in zoning. Hoping to build a shopping center, they purchased a tract previously zoned as agricultural land. For reasons which do not appear in the record, they did not build for five years, although no zoning impediments are alleged to have existed. Now they desire to sell that land at a profit to yet another developer and complain that the city has in the meantime concluded that its interests would best be served

> by residential rather than commercial development of the tract in question. Unable to make the desired profit from the sale of their land, they now seek to recoup it from the city; in so doing they mistake the law.

15 Cal.3d at 522.

Amici submit that appellants' reiteration of this same argument here should be emphatically rejected by this honorable Court.

Dated: March 21, 1980.

Respectfully submitted,

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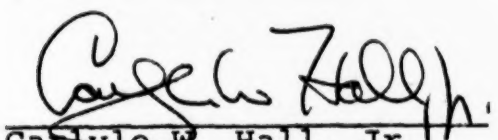
By 
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